MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE
Friday, January 18, 2013
Arizona Courts Building
1501 W. Washington, Conference Room 230
Web Site: http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx

Members Present:
The Honorable Samuel Thumma, Co- Chair
The Honorable Mark Armstrong (Ret.), Co-Chair
Mr. Paul Ahler
The Honorable Dave Cole (Ret.)
Mr. Timothy Eckstein
The Honorable Pamela Gates
Mr. Milton Hathaway
The Honorable Paul Julien
Mr. William Klain
Ms. Shirley McAuliffe
Mr. Carl Piccarreta
Ms. Patricia Refo (via telephone)

Members Not Present:
The Honorable George Anagnost
The Honorable Michael Miller
The Honorable James Soto

Guests Present:
Mr. Jack Levine

Quorum:
Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:00 a.m., welcomed members, and thanked them for their participation on the committee.

2. Reminder of Meeting Schedule/Minutes—Judges Thumma and Armstrong

Judge Thumma reminded committee members of the meeting schedule for the remainder of the year: April 19, June 14 and October 18, 2013.

Judge Armstrong asked whether there were any objections to the draft minutes from the September 28, 2012, meeting. Although there were no objections, approval of the minutes was deferred until the next meeting because approval of the minutes was not included as an agenda item.

3. Petition to Amend Rule 803(10) (R-12-0034)—Judge Armstrong

Judge Armstrong advised the committee that he and Judge Thumma, on behalf of the committee, had filed a petition to amend Rule 803(10) in accordance with the decision of the committee at its last meeting. The petition requests an effective date of January 1, 2014. No comments have been received to date but the comment period extends until May 20, 2013.

Judge Armstrong reminded the committee that the petition was conditioned on approval of the proposed federal rule amendment, which has now been approved by the Judicial Conference and is pending before the U.S. Supreme Court. The final step in the federal rule-making process is approval by Congress. It is expected that if the amendment is approved by Congress the effective date of the federal rule amendment will be December 1, 2013.

4. Report of Subcommittee on Proposed Amendments to Fed. R. Evid. 801(d)(1)(B) and 803(6)—(8)—General Cole

General Cole reported the recommendations of the subcommittee as set forth in the subcommittee report, dated December 3, 2012. He noted there is no real controversy concerning the proposed changes to Rule 803, but the same cannot be said regarding the proposed change to Rule 801. Nonetheless, after considering the concerns of Professor Laird C. Kirkpatrick, as set forth in his article, "An unneeded hearsay amendment," The National Law Journal, October 15, 2012, the subcommittee tentatively recommended that Arizona follow the federal lead.

Judge Armstrong advised the committee that two comments have been filed in response to the federal rule proposal and that the public comment period does not end until February 15, 2013. He asked committee members to monitor the federal courts website, http://www.uscourts.gov/RulesAndPolicies.aspx, for any additional comments. Thus far, a comment expressing concerns about the proposal has been filed by Judge Joan N. Ericksen, District of Minnesota; and a comment opposing the proposal has been filed by Federal Public Defender Michael S. Nachmanoff on behalf of the Federal Public Defenders.

To recap, the proposed amendment to Rule 801(d)(1)(B)—defining certain prior consistent statements as not being hearsay —would provide that prior consistent statements are admissible whenever they would otherwise be admissible to rehabilitate the witness's credibility. The other three proposals would amend Rules 803(6)-(8)—the hearsay exceptions for records, absence of business records, and public records—to eliminate an ambiguity uncovered during the federal restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy. If these proposals proceed in due course, it is expected that these changes to the federal rules would become effective December 1, 2014.

The committee expressed no objections to the proposed amendments of Rule 803. However, no action was taken by the committee at this time pending completion of the federal comment period.

5. Report of Subcommittee on Ariz. R. Evid. 615 and Social Media—Bill Klain

Bill Klain discussed the recommendations of the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings (also known as the "Wireless Committee"), one of which is to "[c]onsider revisions to the rules and jury instructions regarding the exclusion of witnesses. The rules and instructions on this subject are contained in Arizona Rules of Evidence, Rule 615; Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal Rule 8; and the JCA Bench Book."

Mr. Klain summarized the work of the subcommittee as set forth in the subcommittee's report dated December 20, 2012. He expressed that the sense of the majority of the subcommittee was not to recommend any changes to Rule 615. Rather, the subcommittee commends alternative approaches such as changes to the Bench Book, RAJIs and/or admonitions. He noted that the federal courts plan a symposium in the Fall of this year and suggested we might benefit from waiting to see what the federal courts decide to do. Mr. Klain also discussed an article he circulated this morning concerning jury instructions in the digital age: "Modernizing Jury Instructions in the Age of Social Media," by David E. Aaronson and Syndey M. Patterson, Criminal Justice, Winter 2013.

Judge Julien recommended that the committee send a message back to Mark Meltzer, staff to the Wireless Committee, in light of that committee's referral of the Rule 615 issue to this committee. He also noted that this issue is a small part of a much larger issue regarding technology.

Judge Thumma suggested the committee consider a comment to Rule 615 that would include a model admonition for the trial courts. He noted that such a comment would provide wider access to guidance than the Bench Book, which generally is available only to the judiciary.

Ms. Refo opposed adding a comment for reasons of "purity."

Ms. McAuliffe suggested polling other states, a process she agreed to initiate.

Mr. Ahler suggested that the committee at least consider a change to Rule 615.

After considerable discussion, the subcommittee agreed to draft a memorandum and potential amendments to Rule 615, RAJIs and the Bench Book, as appropriate, for discussion at the committee's April meeting.

6. R-12-0039; Proposed Amendment of Rule 412—Jack Levine

Mr. Levine was invited to address the committee concerning his proposed addition of Rule 412, which would actually be Rule 416 because Rule 412 was taken as part of the 2012 amendments.

Mr. Levine made a presentation to the committee, which was followed by considerable discussion. He recommends that Arizona adopt the Indiana rule, which provides as follows:

> Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable.

Mr. Levine argued that this evidence should be admissible under Rules 401 and 402 but that some trial courts require the provider to testify thus conflating the issues of causation and reasonableness. He believes that some trial courts have erroneously interpreted *Larsen v. Decker*, 196 Ariz. 239, 243, 995 P.2d 281, 285 (App. 2000), and that this recurring error would be ameliorated by his proposed rule change.

Mr. Piccarreta "mirrors" the comments and concerns of Mr. Levine.

Mr. Klain informed the committee that the State Bar Civil Practice and Procedure Committee has recommended a comment opposing the petition for various reasons, including the following: (1) there are other means to establish foundation; (2) a special exception should not be carved out for only one type of damages; and (3) most fundamentally, a concern over burden-shifting. Mr. Klain will provide the committee with the State Bar draft comment but cautioned the committee that the comment is a draft only and must go through the State Bar process, including approval by the Rules Committee and Board of Governors.

Ms. McAuliffe advised the committee that although she opposed the proposal as a member of the State Bar committee because it is too broad, a compromise might be appropriate. She suggested that the arbitration rule (Ariz. R. Civ. P. 75) might be extended to appeals.

Judge Gates suggested looking to the Request for Admissions rule (Ariz. R. Civ. P. 36) or Ariz. R. Fam. Law P. 2(B) as means of easing the difficulty of establishing foundation for medical bills.

Messrs. Hathaway (chair), Piccarreta and Eckstein agreed to form a subcommittee to further research this issue, including the Indiana rule, and report back to the committee in April. The subcommittee will also consider the compromise proposals suggested by members.

7. CBT Evidence Module—Judge Julien

Judge Julien reported on the Evidence CBT program and other efforts to educate limited jurisdiction judges on the rules of evidence.

Judge Thumma advised the committee on other educational programs for judges.

8. Report on R-11-0039 (Petition to Amend Rule 608)—Judge Armstrong

Judge Armstrong reminded the committee that at its last meeting, it unanimously voted to recommend rejecting the proposed changes to Rule 608 for the reasons posited by the State Bar and in order to remain consistent with the Federal Rules. Judge Armstrong reported this recommendation to the Court at its December 2012 Rules Agenda, and the Court entered an order on December 10, 2012, rejecting the proposed change.

9. Other Items for Discussion—Judge Armstrong

Judge Armstrong advised that the federal reporter has raised the following possible amendments for the advisory committee's future consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was made.

10.-11. Call to the Public/Adjournment—Judge Thumma

A call was then made to the public.

Following the call to the public, the meeting was adjourned at approximately 11:55 a.m.